

Introduction:

Constitution: means a document having special sanctity which sets out the framework and the principal functions of the government of a State. It is a body of basic/fundamental laws which the government has to follow in administering a state. It determines the relation not only between the government and the people but also between various organs of the government. It differs from ordinary law inasmuch as it prescribes paramount legal norms the legality of which cannot be tested with reference to any higher norm whereas the ordinary law prescribes derivative norms and their validity can be tested with reference to that higher norm. For example, validity of a statutory rule can be tested on the basis of the provisions of the Act under which it is made. If it conflicts with the provisions of the Act, it will be invalid. Similarly, the validity of an Act can be tested on the basis of the provisions of Constitution. If it conflicts with the constitution, it will be declared invalid/ultra vires the constitution.

The essential function of the Constitution is to determine the constitution, powers and functions of the various organs of the government—legislature, executive and judiciary and their relationship with one another. The modern constitution include the Bill of Rights and thus determine relationship between government and the people.

Significance: for any country to have to a systematic government, constitutional law whether in the shape of unwritten conventions or a written document is inevitable.

Constitutional History of India (history pertaining to Constitution of India)

The study in the constitutional history of India can be made under three heads:

1. India under East India Company (1600-1858)
2. India under the control of East India Company (1858-1947)
3. Independent India (1947 onwards)

Unit I

Government of India Act, 1858

The new era in the constitution development of India began with the transfer of power from East India Company to British Crown. It was the year 1858 that the British Crown assumed sovereignty over India. In England, gradually steps were taken by the Charter Acts for 1833 and 1853 to reduce the significance and powers of the Company. The grounds were prepared to abolish the company and to transfer the Governments of Indian territories to the British Crown. The event of 1857 (this was the first armed attempt to overthrow the alien rule in India) gave further edge to the demand of the British public opinion that Company must go.

Revolt 1857—Causes

Political Causes:

- 1. Doctrine of Lapse:** This Doctrine was based on the presumption that the East India Company was the supreme power and India was subordinate to it. The Doctrine made it obligatory on the childless rulers of the native states to get the sanction of the Company before adopting sons to inherit the rulership of their respective states. It was made prior that sanction was to be granted as a special favour and not as a rule. The rigid implementation of the rule deprived the rulers from adoption and thus entitled the British to annex Indian states. In 1853, the Raja of Nagpur Raghoji died without a heir, Lord Dalhousie annexed the State. On the same pretext, the states of Jhansi, Jaitpur, etc. were merged with British India. The Doctrine as such hurt the religious sentiments of people.
- 2. Ill-treatment meted out to Mughal Emperor Bahadur Shah-II:** In the beginning the attitude of the Company towards the Mughal Emperors was favourable but later on the company became a rival of the Emperors especially Bahadur Shah-II. The Company even removed his name from the currency. This shocked the people who were still loyal to the throne.
- 3. Annexation of Oudh:** The Nawabs of Oudh, from 1765 onwards, had been very loyal and faithful to the British rule. Lord Dalhousie, without any valid reason, alleged that the administration of Oudh was weak and insufficient. On this pretext, he annexed the State of Oudh.

Social and Religious Causes:

- 1. Abolition of Sati:** The Company committed a blunder by disrupting the social and religious system of India. The Sati system was stopped by law. This measure, which may appear just and reasonable today, was then considered by Hindu practice as outrageous and insulting to their religious belief.

2. **Caste Disabilities Removal Act, 1850:** This law introduced changes in the laws of inheritance and succession. Before this law, neither a Hindu nor a Muslim could succeed or inherit property in case he/she converted to any other religion. By this law, a Hindu or Muslim could inherit his share in his ancestral property even after adopting any other religion. This antagonised the people and was greatly resented by them.
3. **Racial Discrimination:** The prevalence of discrimination on the basis of race in matters and opportunities of education, employment, access to public offices and military was another cause that triggered the fury of common masses. The Indian soldiers were humiliated, ill-treated and denied equality. The new cartridges were greased with beef, cow and pig fat and required biting before they could be used. This was a deliberate attempt to hurt religious sentiments of both Hindus and Muslims.

A. Government of India Act, 1858

I. (Main Provisions/Highlights/Salient Features)

1. **Taking over the Indian Administration by the British Crown:** The Act provided that India henceforth was to be governed by and in the name of Her Majesty. The designation of the Governor General was changed to the Viceroy of India (Governor General and the Viceroy was the same person. When he dealt with British Provinces, he was known as Governor General and when he dealt with Indian States, he was known as Viceroy, because he acted as Crown's representative in that capacity). The Act also provided for the transfer of military and naval forces of the Company to the Crown.
2. **Secretary of State and his Council:** The Act provided that the powers and duties relating to the Government and revenue of India were to be exercised by the Secretary of State for India. He was a member of British Cabinet and responsible to British Parliament. The Council of 15 members was to assist him. The Council was nominated by the Crown. The Act also provided that nine out of fifteen were to be selected from the persons who had served or resided in India for at least ten years. The aim was to make it an expert body on India affairs. Members could be removed from the office by the Crown on the representation been made by both houses of the Parliament.
3. **Role of Council:** Council was an advisory body, however, its concurrence was not obligatory to the Secretary of the State. The Council was to meet once every week and the quorum of the meeting was five. All the meetings of the Council were presided over by the Secretary of the State.
4. **Powers of the Secretary of the State:** The Secretary of the State was not bound by the views of the majority of the members. He could override majority view. But whenever he did so, he was bound to record in writing the reasons for overthrowing the majority view of the Council. In case of equal division, he was given a casting vote. He was however bound by the decisions of the Council in matters like: appropriation of

revenues and property, issuing of securities of money, sale or mortgage of properties, contracts, etc.

The Secretary of the State for India could even send his secret orders concerning the making of war, peace or negotiations to the Government of India without taking the Council into confidence. He was also given power to form rules and regulations for recruitment to Indian Civil Service.

5. **Appointments:** The Act empowered the Crown to appoint the Viceroy of India and Governors of the Presidencies. It vested in the Viceroy the power to appoint Lieutenant Governors with the approval of Crown. The power to appoint the members of Council, both Centre and Provinces, was given to the Secretary of State in-Council.
6. **Control of British Parliament:** The Act required the Secretary of State to lay annually before Parliament, a financial statement of expenditure and revenues of India. Parliament could ask him questions relating to India, criticise him and could even remove him on the charge of inefficiency.
7. **Abolition of the Board of Control and Directors:** The Act abolished the Board of Control and the Court of Directors because their functions had been transferred to the Secretary of State.
8. **Treaties and Agreements:** All the treaties, agreements, contracts and liabilities of the Company were to be binding on the Crown.
9. **Announcement:** The assumption of the administration of India directly by the Crown was to be announced to the people of India and all princes of the States.

II. Significance of the Act

According to G N Singh, one great significance of the Act was that it closed one great period of Indian history and ushered in another great era—direct rule of the Crown. It rang the death-knell of the trading Company which was born in 1680. The Act enabled the Indian Princes to have direct contact and correspondence with the crown.

Although the Act brought significant changes in the administration of India, yet the Indians in practice got nothing.

B. Indian Councils Act, 1861

Salient Features:

- I. **Extension of Executive Council:** The Act provided for the enlargement of Governor General's Executive Council by adding fifth member to it. The added member was to be a financial expert. Commander-in-Chief was an extraordinary member of the executive council.
- II. **Extension of Legislative Council:** The Act provided for addition of six to twelve members to the central Executive for legislative purpose. At least half of the additional members were to be non-officials including Indians. These members were to be nominated by the Governor General for a period of two years.

III. Powers of Legislative Council: The Act empowered the Council to legislate on all subjects concerning all persons in British India. In legislation effective powers were reserved to the Governor General. The introduction of bills concerning important matters like public debt, the army, the coinage and currency, the foreign and political relations, posts and telegraphs required prior sanction of the Governor General. Every bill passed by the Council required the assent of the Viceroy to become an Act. He could give his consent or even exercise his veto power if he felt that the bill affected the safety, peace and interest of British India. Besides that, all laws were to be communicated to the Secretary of the State who could disallow them with the assent of the crown.

IV. Powers of Viceroy:

- a. **Power to issue ordinances:** The Viceroy was empowered to issue ordinances during an Emergency. The life of such ordinance was six months. However, it could be suspended even earlier by the Secretary of State in Council.
- b. **Power to create new provinces:** The Viceroy was empowered to alter, modify, or adjust the limits of the provinces or create a new province for administrative convenience.
- c. **Power to delegate business:** The Viceroy was empowered to allocate one or more portfolios to every member of his executive council. The division of work proved very convenient for the transaction of day to day business. Whenever the Viceroy differed with the member, the matter was discussed in the Council meeting. He was empowered to make rules and regulations for the convenient transaction of business.
- d. **Power to nominate the President of the Council:** The Act empowered the Viceroy to appoint a President of the Council to discharge his duties in his absence.
- e. **Power to appoint Lieutenant Governors:** The power was given to Viceroy to appoint Lieutenant Governors and Legislative Councils for smaller provinces.

V. Provincial Councils were again empowered to make laws: The law making power was restored to the Governments of Bombay and Madras. The provincial Legislative Council could make laws for good government of the province. However, important legislative powers like army, currency, customs, coinage, foreign affairs, etc. were outside scope. For law making, the consent of the Governor and Governor General was made necessary for all legislations. The Secretary of State could also disallow laws with the consent of the Crown.

VI. Extension of Executive Councils of Madras and Bombay: The Act provided for the enlargement of the Executive Councils Madras and Bombay by the addition of advocate general and four to eight members for legislative purposes. Not less than half of these members were to be non-officials. The members were nominated by the Governor and their term was of two years.

Analysis of the Act:

The Indian Councils Act is significant in the Constitutional history of India-

1. It enabled the Governor General to associate the people of India with the work of legislation;
2. Legislative powers were restored to the Governments of Bombay and Madras;

3. It laid good principles of Indian administration e.g. it introduced portfolio system, gave ordinance power to Governor General, which constitute until now the cardinal features of Indian administration.

In spite of all these changes, the Act of 1861 was not much satisfying to the national aspirations. It felt short of public demands.

The Indian Councils Act did not establish legislative council in the real sense of the term. A legislative council can discuss any matter facing the nation besides legislations as it is considered essentially a deliberative or debating body. This power was not given to the Council. Its functions were confined to law making only. Indians were appointed the Legislative Council but no statutory provisions was made for the nomination of Indians. They appointed Indian but they were Maharajas or their Diwans who did not represent Indian public opinion. The main aim of appointing them was not to associate Indian public opinion but only to placate Rajas and Maharajas who could help them later on to stabilise their rule. The Indian members of the Central or Provincial Legislative Councils generally supported the British Government as they were not elected and did not represent anybody. Being nominated by the British Government, they were bound to support them. Hence the nominations of Indians to the Council did not satisfy the nationalists in India. The Indian members in general were magnificent non entities. The Act made no progress towards giving representative government to India. The Legislative Councils were mere committees to assist the Executive in making laws. The laws made by them were nothing but orders of the Government. The veto power took away whatever few rights it had conferred on the Council in theory.